83-1369

NO.

Office - Supreme Court, U.S.
FILED
FEB 16 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM W. BRYSON,

Petitioner,

v.

MACFIELD TEXTURING, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
FOR THE FOURTH CIRCUIT

Harvey L. Kennedy
Harold L. Kennedy, III
KENNEDY, KENNEDY,
KENNEDY AND KENNEDY
710 First Union Building
Winston-Salem, NC 27101

Counsel for Petitioner

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

QUESTION PRESENTED FOR REVIEW

WHETHER THE NINETY-DAY PERIOD FOR FILING A LAWSUIT UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT COMMENCES FROM THE TIME THE PLAINTIFF RECEIVED HIS NOTICE OF RIGHT-TO-SUE OR FROM THE TIME HIS FORMER ATTORNEY RECEIVES A COPY OF SAID NOTICE?

TABLE OF CONTENTS

		Page
1.	Opinions Below	1
2.	Jurisdiction	2
3.	Question Presented for Review	3
4.	Statute Involved	3
5.	Statement of Case	4
Conclusion		17
Exhibit A		20
Exhibit B		43

TABLE OF AUTHORITIES

Archie v. Chicago, 585 F.2d 210 (7th Cir. 1978)

Bell v. Brown, 558 F.2d 849 (U.S. App. D.C. 1977)

Craig v. Department of HEW, 581 F.2d. 189 (8th Cir. 1978)

Decker v. Anheuser-Busch, 632 F.2d 1221 (5th Cir. 1980)

Gonzalez v. Stanford Applied Engineering, Inc., 597 F.2d 1298 (9th Cir. 1979)

Harper v. Burgess, 701 F.2d 29 (4th Cir. 1983)

Pinkard v. Pullman-Standard, A Division of Pullman, Inc., 678 F.2d 1211 (5th Cir. 1982)

Rea v. Middendorf, 587 F.2d 5 (6th Cir. 1978)

Rice v. New England College, 676 F.2d 9 (1st Cir. 1982)

Thomas v. KATV Channel 7, 692 F.2d 548 (8th Cir. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 1431, 75 L.Ed.2d 790 (1983)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

WILLIAM W. BRYSON,

Petitioner,

v.

MACFIELD TEXTURING, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

---

1. OPINIONS BELOW

The opinion and order of the United States District Court for the Middle District of North Carolina, at caption number C-81-447-G, was entered on

September 23, 1982, and is attached as Exhibit A. The opinion of the United States Court of Appeals for the Fourth Circuit, at caption number 82-1955, was entered on November 18, 1983, and is attached as Exhibit B.

2. JURISDICTION

The order of dismissal of the United States District Court for the Middle District of North Carolina was entered on September 23, 1982, and affirmed by the United States Court of Appeals for the Fourth Circuit on November 18, 1983. The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fourth Circuit is conferred by Title 28, United States Code, Section 1254(1).

3. QUESTION PRESENTED FOR REVIEW

WHETHER THE NINETY-DAY PERIOD FOR FILING A LAWSUIT UNDER TITLE VII OF THE 1964 CIVIL RIGHTS ACT COMMENCES FROM THE TIME THE PLAINTIFF RECEIVES HIS NOTICE OF RIGHT-TO-SUE OR FROM THE TIME HIS FORMER ATTORNEY RECEIVES A COPY OF SAID NOTICE?

4. STATUTE INVOLVED

The case involves 42 U.S.C. Section 2000e-5 which states in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a

government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

5. STATEMENT OF CASE

The petitioner, William W. Bryson, filed an EEOC charge with the Equal Employment Opportunity Commission, alleging that the respondent, Macfield Texturing, Inc. had discriminated against him in discharge because of his race in violation of Title VII of the Civil Rights Act of 1964. On April 16, 1979, Mr. Bryson employed the law firm of Chambers, Stein, Ferguson and Becton of Charlotte, North Carolina to represent him in the conciliation process for the purpose of attempting the settlement of his charge.

On December 15, 1980, the EEOC completed its investigation and found that there was reasonable cause to believe that the petitioner had been discriminated against because of his race. On the same day, Mr. Bryson and Mr. Louis Lesesne, Jr., an attorney from said law firm, signed a written "Invitation to Participate in Settlement Discussions," which authorized Mr. Lesesne to represent him in the EEOC conciliation process. On February 27, 1981, the petitioner was notified by letter that the EEOC's efforts at conciliation had failed.

On April 6, 1981, a Notice of Right-To-Sue was mistakenly mailed to Mr. Bryson, and was received by him on April 11, 1981. After receiving the Notice of Right-To-Sue, which erroneously stated that it was issued upon the request of Mr. Bryson, he talked with the EEOC and was

informed that the letter had been mistakenly sent. On April 10, 1981, an "Amended Notice of Right-To-Sue" was mailed to the petitioner, and was returned to the Commission unclaimed on or about May 1, 1981. Mr. Lesesne received his copy on April 13, 1981. On May 11, 1981, the EEOC mailed a letter and a copy of the Amended Right-To-Sue letter to Mr. Bryson, which was received by him at his home in Littleton, Colorado on May 14, 1981. On August 12, 1981, which was within 90 days of the date of his receipt of the copy of the Amended Right-To-Sue Notice, the petitioner filed this lawsuit. It was at that time that Mr. Bryson first had any knowledge of the issuance of an Amended Right-To-Sue notice.

Although Mr. Bryson and his wife spoke with Mr. Lesesne about the possibility of retaining his services

after February 27, 1981, he was never retained by the petitioner to represent him in any legal matters after that date. He retained the law firm of Kennedy, Kennedy, Kennedy and Kennedy in Winston-Salem, North Carolina to represent him in August 1981, and to file a lawsuit on his behalf.

On January 28, 1982, the respondent filed a Motion for Summary Judgment, which was denied by the District Court on May 6, 1982. On July 23, 1982, the respondent filed a Second Motion for Summary Judgment, which was granted by the District Court on September 23, 1982. On November 18, 1983, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court. It is from that decision that William W. Bryson petitions this Court for a Writ of Certiorari.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE QUESTION OF WHETHER THE NINETY-DAY PERIOD FOR FILING A LAWSUIT UNDER TITLE VII OF THE 1964 CIVIL RIGHT ACT COMMENCES FROM THE TIME THE PLAINTIFF RECEIVES HIS NOTICE OF RIGHT-TO-SUE OR FROM THE TIME HIS FORMER ATTORNEY RECEIVES A COPY OF SAID NOTICE.

The United States Court of Appeals for the Fourth and Ninth Circuits have held that the receipt of a copy of the notice of right-to-sue by a plaintiff's attorney commences the ninety-day period for filing a lawsuit under Title VII of the 1964 Civil Rights Act. This is in substantial conflict with the decisions of the United States Court of Appeals for the Fifth, Sixth, Seventh, Eighth, and District of Columbia Circuits, which have rejected the constructive notice theory as it pertains to Title VII.

In the instant case, the United States Court of Appeals for the Fourth

Circuit affirmed the granting of the defendant's Motion for Summary Judgment by stating that it had previously decided the issue raised in this case. In Harper v. Burgess, 701 F.2d 29 (4th Cir. 1983), the Fourth Circuit was faced with the factual situation where the plaintiff was represented by an attorney in the EEOC administrative process, who sought a right-to-sue letter from the EEOC in April 1980. Although her lawyer received a copy of the right-to-sue letter, she did not presumably because she had moved to another address. Because of this the EEOC sent a second right-to-sue letter to the plaintiff and her attorney in March 1981, which she did receive. The Court held at p. 450:

> The district court granted defendant's motion for summary judgment, finding the suit time barred, after concluding that notice to Harper's counsel was notice to her for purposes of

> the 90-day filing period. We agree and rely upon the reasoning of the district court.

Likewise, the United States Court of Appeals for the Ninth Circuit in Gonzalez v. Stanford Applied Engineering, Inc., 597 F.2d 1298 (9th Cir. 1979) also applied the constructive notice doctrine to Title VII. It held at p. 1299:

> We hold that when the request for issuance of a right to sue letter comes from a claimant's attorney, notice to the attorney that the right to sue has been granted starts the time running. Communication with the attorney respecting the right to sue letter that he had himself requested on behalf of his client was communication with the claimant in the proper and appropriate way.

The Court in Gonzalez, supra. was careful not to apply an absolute rule of constructive receipt in Title VII cases. Rather, it stressed the fact that the constructive receipt theory was applicable where the plaintiff's attorney had

notified the EEOC in writing and has requested the issuance of the right-to-sue letter, and that the same lawyer continued to represent the plaintiff in pursuing litigation.

Although the Court of Appeals for the Fifth Circuit in Decker v. Anheuser-Busch, 632 F.2d 1221 (5th Cir. 1980), had previously held that receipt of the notice of right-to-sue by an attorney representing the plaintiff constitutes receipt of notice by the plaintiff, this decision has been subsequently vacated and remanded. See Decker v. Anheuser-Busch, 670 F.2d 506 (5th Cir. 1982) (banc).

These decisions are in substantial conflict with decisions of the Fifth, Sixth, Seventh, Eighth, and District of Columbia Circuits on this issue. In the recent case of Thomas v. KATV Channel 7, 692 F.2d 548 (8th Cir. 1982), cert.

denied, ____ U.S. ____, 103 S.Ct. 1431, 75 L.Ed.2d 790 (1983), the plaintiff filed her lawsuit within ninety days after she actually received the notice of right-to-sue, but ninety-nine days after her lawyer received it. The Court held at p. 550:

> Appellee KATV asks this Court to adopt the holding of the majority in Decker. We decline to do so. In Craig v. Department of HEW, 581 F.2d 189 (8th Cir. 1978), this Court rejected the argument that receipt of notice of a right-to-sue letter by an employee of the attorney of an aggrieved federal employee constituted receipt of notice by the aggrieved party as contemplated by the relevant statutory provision... Although Craig involves the provision of Title VII pertaining to federal employees, the above-quoted language is clearly applicable to Title VII suits by private employees as well. We agree with the dissent in the Decker panel opinion which recognized that the Craig rationale is applicable to cases brought under Section 2000e-5(f)(1). Decker, 632 F.2d at 1225 (Rubin, J., dissenting). 'The shared remedial purpose compels the same interpretation.' Id.

Likewise, the United States Court of Appeals for the District of Columbia rejected to constructive notice doctrine relating to federal employees under Title VII. The Court held in Bell v. Brown, 557 F.2d 849 (U.S. App. D.C., 1977) at p. 853:

> The evident purpose of the notice requirement is to inform that the administrative process has run its course and to admonish that the brief period for instituting a lawsuit is about to commence. Like the Civil Service Commission, we think Section 717(c) contemplates service of the notice on the employee. That construction is reasonable enough in light of the many instances of employees never having counsel, and those wherein there may be doubt as to the extent of legal representation for the administrative phase only, or for all purposes.

The Seventh Circuit has also refused to apply the doctrine of constructive receipt to Title VII. In Archie v. Chicago, 585 F.2d 210 (7th Cir. 1978) the Court was being realistic when it refused

to apply the constructive receipt doctrine. It held at p. 215:

> Were we to read the doctrine of constructive receipt into the language of 42 USC Section 2000e-5(f)(1), we would be conditioning a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute.

See also Rea v. Middendorf, 587 F.2d 5 (6th Cir. 1978); Pinkard v. Pullman-Standard, A Division of Pullman, Inc., 678 F.2d 1211 (5th Cir. 1982); and Rice v. New England College, 676 F.2d 9 (1st Cir. 1982).

The question presented to this Court in this Petition is significant because every plaintiff under Title VII is effected by when the ninety-day filing period begins and whether the time period begins to run from when he actually receives the right-to-sue notice. This question impacts on thousands of litigants

annually and thus, is an issue of great public concern. Furthermore, the issue presented here is of public policy significance. Not only does this issue involve the statutory construction of Title VII, but it directly involves the application of this statute by the Equal Employment Opportunity Commission through its regulations. The 1980 EEOC federal regulations which were in effect at the time that the petitioner, William Bryson, received his notice of right-to-sue are in direct conflict with the decisions of the Fourth and Ninth Circuits. 29 CFR Section 1601.28(b)(1)(1980) provides for the issuance of the right-to-sue letter to the "person claimed to be aggrieved." The importance of the issue presented in this Petition was elucidated in Bell v. Brown, supra. at 853:

The initial guidepost is the consideration that 'where congressional purpose is unclear, courts have traditionally resolved ambiguities in remedial statutes in favor of those whom the legislation was designed to protect.' We have heretofore recognized 'that Title VII is remedial in character and should be liberally construed to achieve its purposes', 'for this reason', we have observed, 'courts confronted with procedural ambiguities in the statutory framework have, with virtual unanimity, resolved them in favor of the complaining party.' 'That approach,' we have added, 'reflects not only the manifest importance of Title VII rights to complaining parties, but also the broad national commitment to eliminating such discrimination and the importance of private suits in fulfilling that commitment.

CONCLUSION

Because of the national importance of the issue presented herein, and the substantial conflict between the United States Court of Appeals explained above, the petitioner respectfully asks this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

Harvey L. Kennedy

Harold L. Kennedy, III
KENNEDY, KENNEDY, KENNEDY
AND KENNEDY
710 First Union Building
Winston-Salem, N.C. 27101
(919) 724-9207
ATTORNEYS FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

WILLIAM W. BRYSON,

Petitioner,

v.

MACFIELD TEXTURING, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an attorney at law licensed to practice in the State of North Carolina, is attorney for the petitioner and is a

person of such age and discretion to be competent to serve process.

That on February 15, 1984, he serve the required copies of the attached Petition For Writ of Certiorari by placing said copies in a postpaid envelope addressed to the person hereinafter named, at the place stated below, which is the last known address, and by depositing said envelope and its contents in the United States mail.

Addressee:

Mr. W. T. Cranfill, Jr.
Blakeney, Alexander & Machen
3450 NCNB Plaza
Charlotte, North Carolina 28280

Harvey L. Kennedy

Harvey L. Kennedy
KENNEDY, KENNEDY, KENNEDY AND KENNEDY
710 First Union Building
Winston-Salem, North Carolina 27101
Telephone: (919) 724-9207

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

WILLIAM W. BRYSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C-81-447-G
	)	
MACFIELD TEXTURING, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

WARD, Chief Judge

This matter is before the Court on Defendant's Second Motion for Summary Judgment (July 27, 1982) wherein defendant contends that the 90 day filing limitation period provided in 42 U.S.C. Section 2000e(f)(1) bars plaintiff's action under 42 U.S.C. Section 2000e-2(a) for racially discriminatory denial of promotion and

discharge. Inasmuch as the attorney who represented plaintiff before the Equal Employment Opportunity Commission (EEOC) received a notice of right to sue more than 90 days prior to the plaintiff's bringing this lawsuit, plaintiff failed to comply with the limitation requirement in Section 2000e-5(f)(1). The Court will grant defendant's motion.

Defendant employed plaintiff from May, 1971, until it discharged him October 24, 1975. Plaintiff, who is black, filed a charge of racial discrimination on October 28, 1975, with the EEOC. Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Affidavit of William Ferry Exhibit A (March 15, 1982) (Ferry is an EEOC Compliance Manager) (hereafter Ferry Affidavit No. 1). On April 18, 1979, Louis L. Lesesne, Jr., notified the EEOC

that he had been retained by the plaintiff to represent him before the EEOC with respect to the discrimination charge. Defendant's Second Motion for Summary Judgment, Affidavit of William E. Ferry Paragraph 4 & Exhibit C (July 27, 1982) (hereafter Ferry Affidavit No. 2). In this notification Lesesne directed the EEOC to direct all further correspondence to him as plaintiff's attorney.

Plaintiff retained Lesesne's law firm to represent him in April, 1979. The retainer agreement provided that Lesesne would represent plaintiff before the EEOC and attempt to obtain a favorable compromise settlement on plaintiff's behalf. The agreement specifically provided that the firm did not agree to commence litigation on plaintiff's behalf. Affidavit of William W. Bryson Contract for Legal Services (August 12, 1982) (hereafter

Plaintiff's Affidavit No. 2). In February, 1982, Lesesne left this law firm, however he continued to represent plaintiff. Affidavit of Louis L. Lesesne, Jr. Paragraph 4 (September 2, 1982) (hereafter Lesesne Affidavit).[1]

---

[1]Lesesne filed this affidavit in compliance with the Court's Order of August 26, 1982.

On September 22, 1982, the Court received from counsel for the plaintiff a letter requesting permission to file yet another affidavit by the plaintiff on or before October 11, 1982, which would be a response to Lesesne's affidavit. The Court received this letter at a time when all pleadings on defendant's motion had been closed and this Memorandum Opinion and Order had been prepared. Plaintiff has already filed two affidavits concerning the issue presented by that motion. In the letter counsel does not state what, if any, new matters this third affidavit might contain. Furthermore, counsel did not notify the Court of plaintiff's desire to file another affidavit until almost three weeks after Lesesne filed his affidavit. Under the circumstances, delaying a resolution of defendant's motion not warranted.

On December 15, 1980, the EEOC issued its determination that reasonable cause existed to believe that plaintiff's charge was true and invited the parties to conciliate. Ferry Affidavit No. 1 Exhibit B. Lesesne accepted the invitation on plaintiff's behalf. Deposition of Louis L. Lesesne, Jr. Exhibit E (July 27, 1982) (hereafter Lesesne Deposition). On February 27, 1981, the EEOC informed the defendant that its conciliation efforts had been unsuccessful and that no further efforts to conciliate would be forthcoming. Ferry Affidavit No. 1 Paragraph 7 & Exhibit C. See 29 C.F.R. Section 1601.25(1980). Plaintiff states in his Response in Opposition to Defendant's Second Motion for Summary Judgment (August 12, 1982) at Paragraph 4 that the EEOC notified plaintiff on February 27, 1981, that its efforts to conciliate the matter

had failed. Subsequently, on March 2, 1981, Lesesne by letter requested the EEOC to furnish him a copy of its investigative file and a nondisclosure agreement form. The attorney commented in the letter that he made the request "in connection with the possibility of initiating litigation." Lesesne Deposition Exhibit C. Lesesne filed a nondisclosure agreement with the EEOC or March 16, 1982, as counsel for plaintiff. Lesesne Deposition Exhibit D.

Upon learning on March 2, 1982, that the EEOC would not file its own action, Lesesne wrote to plaintiff advising that they would expect to receive a right to sue notification from the EEOC. Lesesne Affidavit Paragraph 6. On April 6, 1982, the EEOC sent to plaintiff and his counsel, Lesesne, a Notice of Right to Sue on EEOC Form 161-B. Ferry Affidavit No. 1 Exhibit D-1; Lesesne Deposition Exhibit A.

On this form the EEOC erroneously stated that it issued the notice upon request of the charging party, the plaintiff, and also advised that plaintiff had 90 days from receipt of the notice in which to bring suit and that with issuance of the notice it was ceasing further administrative proceedings. The EEOC did not state therein that it had previously decided not to bring civil action or that it had so advised plaintiff's counsel. Plaintiff received the notice on April 11, 1981. Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Affidavit of William W. Bryson Paragraph 4 (March 15, 1982) (hereafter Plaintiff's Affidavit No. 1). Lesesne received the notice on April 7, 1981. Lesesne Deposition Exhibit A. Lesesne notified plaintiff by mail of his receipt of the notice. Lesesne Deposition Paragraph 8.

Soon after issuing the April 6 notice, the EEOC realized that it had utilized the wrong form, Form 161-B. Plaintiff had not requested a Notice of Right to Sue, rather the EEOC itself had determined several weeks before not to bring a civil action. Consequently, on April 10, 1981, the EEOC issued an amended Notice of Right to Sue on Form 161-A. Ferry Affidavit No. 1 Paragraph 9 & Exhibit E. In the amended notice the EEOC stated that although it found reasonable cause to believe plaintiff's charge of racial discrimination was true, it had determined not to bring a civil action against defendant and accordingly was issuing the notice. The EEOC also stated therein that plaintiff's right to sue would expire 90 days after receipt of the amended notice. Lesesne received the amended notice on April 13, 1981. Lesesne

Deposition Exhibit B. Plaintiff did not receive a copy of the amended notice until May 14, 1981. Plaintiff's Affidavit No. 1 Paragraph 5.[2] However, on April 16, 1982, three days after his receipt of the amended notice, Lesesne spoke with plaintiff on the telephone and discussed the terms of a new retainer agreement whereby Lesesne would now bring a lawsuit

---

[2]Two attempts by the EEOC to send the amended notice to plaintiff by certified mail proved unsuccessful. On May 11, 1981, the EEOC mailed to plaintiff a noncertified letter containing a copy of the amended notice. Plaintiff received this letter on May 14. Defendant contends that this delay was the result of plaintiff's failure to advise the EEOC of his new address. However, plaintiff testified that he advised the EEOC in August, 1979, by telephone of his new address. Affidavit of William W. Bryson Paragraph 3 (August 12, 1982). In any event, Lesesne notified the EEOC of his client's new address to which all three letters containing the amended notice were sent. Defendant's Second Motion for Summary Judgment, Affidavit of William E. Ferry Paragraph 5 (July 27, 1982). Hence, lack of knowledge of plaintiff's new address did not cause the failure of the certified letters to reach the plaintiff.

on plaintiff's behalf. Lesesne Affidavit Paragraph 9.

On June 30, 1982, Lesesne spoke with plaintiff's wife on the telephone. She advised Lesesne that plaintiff desired to enter into the new agreement. The next day, July 1, Lesesne wrote to plaintiff and explained the need to take some action within 90 days of April 7, 1981, since he believed that the 90 day period might have commenced on that date. Lesesne Affidavit Paragraph 10. On July 22, 1981, plaintiff's wife called Lesesne to request him to send the EEOC investigative file to plaintiff's new counsel which he did on July 23. Lesesne Deposition at 11; Lesesne Affidavit Paragraph 11. Lesesne states that until July 22 plaintiff had continued to advise that he wished Lesesne to represent him. Plaintiff's present

counsel filed this lawsuit on August 12, 1981, which is more than 90 days after Lesesne's receipt of the amended notice.

In its motion defendant contends that 42 U.S.C. Section 2000e-5(f)(1) obligated plaintiff to file this action no later than 90 days after his counsel, Lesesne, received the amended notice on April 13, 1981. Plaintiff argues that receipt of the notice by plaintiff's counsel serves as imputed or constructive receipt by plaintiff. Plaintiff responds that Lesesne ceased being his counsel on February 27, 1981, when the EEOC terminated the conciliation process. He also contends that notice to counsel should not be imputed to a plaintiff suing under Title VII.

Section 2000e-5(f)(1) provides that the person aggrieved may bring a civil action "within ninety days after the

giving of (a Notice of Right to Sue)." Timely filing of the civil action is a condition precedent to the right to bring the action. Garner v. E.I. DuPont De Nemours & Co., 538 F.2d 611 (4th Cir. 1976). Notice is given when actually received by the charging party. Menn v. Amstar Corp., 476 F.Supp. 303, 305 (D.Md. 1979). Moreover, if warranted by the circumstances, the filing time limitation is subject to equitable tolling. Zipes v. T.W.A., ___ U.S. ___, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Section 2000e-5(f)(1) directs the EEOC to issue a Notice of Right to Sue upon dismissal of the complainant's charge or upon the failure of conciliation efforts and the EEOC's decision not to bring a civil action. More succinctly stated, the 90 day period commences upon the complainant's receipt

of notice of the termination of the EEOC's handling of his charge.

In Decker v. Anheuser-Busch, 632 F.2d 1221 (1980), vacated on other grounds and remanded, 670 F.2d 506 (5th Cir. 1982), the court held that receipt of notice by an attorney who is formally representing the complainant in the EEOC proceeding constitutes receipt of notice by the complainant and begins the running of the 90 day period. The court based its opinion upon the professional responsibilities of all attorneys to their clients and upon the "long standing tradition that notice to or knowledge by the attorney is notice to or knowledge by the client." Decker v. Anheuser-Busch, 632 F.2d at 1224. Plaintiff argues that Decker is distinguishable because the attorney who received the notice represented the complainant in the subsequent lawsuit.

However, the court in Decker stressed that the critical fact is "whether the attorney is representing the complainant in the EEOC proceeding at the time of receipt of the notice...." Decker v. Anheuser-Busch, 632 F.2d at 1223. Here, Lesesne contacted the EEOC in 1979, informed it that he would be representing the plaintiff, and directed it to send all future correspondence to him.

In Mays v. Memphis Light, Gas & Water Division, 517 F.Supp. 232 (W.D. Tenn. 1981), the complainant's counsel before the EEOC received the notice 91 days prior to bringing the lawsuit. As in Decker, the district court specifically noted that the attorney who received the notice had represented the complainant before the EEOC. The court held that receipt of notice by that attorney was sufficient to start the running of the 90 day period.

See also, Gonzalez v. Stanford Applied Engineering, Inc., 597 F.2d 1298 (9th Cir. 1979) (receipt by attorney of notice upon request is notice to the client); Minor v. Lakeview Hospital, 421 F.Supp. 485 (E.D. Wis. 1976) (receipt by attorney of requested notice binds the complainant).

Plaintiff contends that Lesesne ceased being his attorney in February, 1981, when the EEOC-sponsored conciliation process terminated. In support of this assertion he merely directs the Court's attention to the April, 1979, retainer agreement which provides that counsel's efforts are limited to obtaining a compromise settlement and do not include litigation. Plaintiff's interpretation of the contract is distorted. In no manner does the agreement curtail counsel's efforts or duties upon failure of the conciliation process. Furthermore, Lesesne clearly

continued to represent plaintiff before the EEOC after February, 1981, with plaintiff's knowledge and without any objection by plaintiff. The retainer agreement essentially called for counsel to represent plaintiff before the EEOC until it terminated its handling of plaintiff's charge when plaintiff became obliged to bring a lawsuit or forever forego his claim of discrimination. The EEOC sent the notice to the attorney retained by plaintiff to act on his behalf before the EEOC and who so acted in an active and continuous manner.

Plaintiff states that prior to 1980 the EEOC regulations provided for service of notice on the complainant personally, as well as his attorney, and that in 1980 the regulations were amended to provide for notice only to the aggrieved party.

29 C.F.R. Section 1601.28(b) (1980).[3] Plaintiff contends that this change clearly shows that the 90 day period commences upon receipt of notice by the complainant. Plaintiff clearly misinterprets the significance, if any, of the change. The older version is more favorable to plaintiff. The older version of the regulation requires personal service of the notice upon the complainant even if he has counsel. Decker v. Anheuser-Busch, 632 F.2d at 1224 (Rubin, J., dissenting). In any event, the court in Decker was dealing with the older version when it ruled that the 90 day period commenced on the date the attorney received the notice.

Plaintiff contends that constructive notice is contrary to the remedial

---

[3]This regulation was so amended prior to 1980. See 29 C.F.R. Section 1601.28(b) (1978).

purposes of Title VII and is therefore improper. In Bell v. Brown, 557 F.2d 849 (D.C. Cir. 1977), an action by a federal employee under 42 U.S.C. Section 2000e-16(c), the court rejected the constructive receipt doctrine. The court founded its decision upon the belief that the procedural scheme of Title VII, and Section 2000e-16(c) in particular, is based on the assumption that Title VII complainants often will lack counsel and upon the facts that the responsible federal agency, the Civil Service Commission, issued regulations calling for personal receipt of notice by the plaintiff as well as counsel and interpreted Section 2000e-16(c) as directing the limitation period to commence upon receipt of notice by the complainant. Here, however, there is no indication that the EEOC has similarly advised or directed

that notice may not be imputed. Consequently, the reasoning in Bell does not compel a similar result under Section 2000e-5(f)(1). Cooper v. Lewis, 644 F.2d 1077, 1085-87 (5th Cir. 1981). Furthermore, this Court perceives no unfairness in the constructive receipt doctrine inasmuch as the complainant is obviously represented by counsel, the person who can and should promptly advise his client about the ramifications of a Notice of Right to Sue.

Finally, plaintiff argued that he should be allowed to proceed with this lawsuit under equitable principles. He states that he had no knowledge of the amended notice until May 14, 1981. The uncontested evidence shows that as early as March 2 he became aware through his attorney of the EEOC's intention to issue a Notice of Right to Sue. To Lesesne's

credit he specifically advised plaintiff by letter in July, 1981, that the 90 day period might run from April 7 when he received the first Notice of Right to Sue. To allow plaintiff to proceed now would mean depriving defendant of the protection of the 90 day filing period as the remedy for an error of plaintiff's counsel in not bringing a timely action or, as the case may be, for plaintiff's tardiness in retaining new counsel in disregard of the filing period and his counsel's warning. Hence, under the circumstances equity cannot aid the plaintiff.

IT IS, THEREFORE, ORDERED that defendant's motion for summary judgment be, and the same hereby is, GRANTED.

A Judgment dismissing this action will be entered accordingly.

s/ Hiram H. Ward
UNITED STATES DISTRICT JUDGE

September 23, 1982.

By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

WILLIAM W. BRYSON, Plaintiff,	)	
vs.	)	C-81-447-G
MACFIELD TEXTURING, INC., Defendant.	)	

ORDER OF DISMISSAL

This matter came before the Court for ruling on Defendant's Second Motion for Summary Judgment (July 27, 1982). In a Memorandum Opinion and Order entered contemporaneously herewith, the Court concluded that the defendant's motion should be granted and that this action should be dismissed.

IT IS, THEREFORE, ORDERED that this action be, and the same hereby is, DISMISSED.

s/ Hiram H. Ward
United States District Judge

September 23, 1982.

A True Copy

Teste:
Carmon J. Stuart, Clerk
By:

_____
Deputy Clerk

EXHIBIT "B"

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1955

William W. Bryson,

Appellant,

v.

Macfield Texturing, Inc.,

Appellee.

Appealed from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, District Judge. C/A C-81-477-G

Submitted: February 28, 1983

Decided: November 18, 1983

Before WIDENER, MURNAGHAN, and SPROUSE, Circuit Judges.

(Harold L. Kennedy, III, Harvey L. Kennedy, KENNEDY, KENNEDY, KENNEDY & KENNEDY, for the Appellant. W.T. Cranfill, Jr., for the Appellee.)

PER CURIAM:

A review of the record and the district court's opinion discloses that this appeal from that court's order granting summary judgment is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court. Bryson v. Macfield Texturing, Inc., C/A No. C-81-447-G (M.D.N.C. Sept. 23, 1982).

AFFIRMED.

Office - Supreme Court, U.S
FILED
MAR 19 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1369

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM W. BRYSON,

Petitioner,

v.

MACFIELD TEXTURING, INC.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION

W.T. CRANFILL, JR.
3450 NCNB Plaza
Charlotte, N. C. 28280
704 372-3680

Of Counsel:
BLAKENEY, ALEXANDER & MACHEN
Charlotte, N. C. 28280

TABLE OF CONTENTS

	Page No.
The Petition Misrepresents The State Of The Law As To The Application Of A Constructive Receipt Theory To A Title VII Case	1

TABLE OF AUTHORITIES

Cases:

Archie v. Chicago Truck Drivers, Etc., 585 F.2d 210 (7th Cir. 1978)	11
Bell v. Brown, 557 F.2d 849 (D.C.Cir. 1977)	9
Decker v. Anheuser-Busch, 632 F.2d 1221 (5th Cir. 1980)	2
Gonzalez v. Stanford Applied Engineering, Inc., 597 F.2d 1298 (9th Cir. 1979)	7
Pinkard v. Pullman-Standard, 678 F.2d 1211 (5th Cir. 1982)	12
Rea v. Middendorf, 587 F.2d 4 (6th Cir. 1978)	11
Rice v. New England College, 676 F.2d 9 (1st Cir. 1982)	13

	Page No.
Thomas v. KATV Channel 7, 692 F.2d 548 (8th Cir. 1982), cert. den., 103 S.Ct. 1431, 75 L.Ed.2d 790 (1983)	4, 5, 8
Statutes:	
42 U.S.C. §2000e, et seq.	2
42 U.S.C. §2000e(f)(1)	3

No. 83-1369

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM W. BRYSON,

Petitioner,

v.

MACFIELD TEXTURING, INC.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION

The Petition Misrepresents The State Of The Law As To The Application Of A Constructive Receipt Theory To A Title VII Case

The Petition argues that the opinion of the Court of Appeals for the Fourth Circuit in this case conflicts with decisions of other circuits. Review is sought of a decision applying a constructive receipt

ruling as between a claimant and his duly designated and authorized attorney at law, in order to determine whether a plaintiff's Title VII[1] suit was timely filed.

Macfield Texturing, Inc. respectfully submits that the Petition vainly endeavors to create an issue or controversy where none in fact exists. Each of the allegedly conflicting decisions cited by the Petition is either completely inapposite to, or factually distinguishable from, the decision in the case at hand.

It is not the purpose of this Brief in Opposition to reiterate the legal bases supporting the decisions below. Those decisions, attached as "exhibits" to the Petition, are clear, well-reasoned and self-explanatory.

The Petition disingenuously asserts that Decker v. Anheuser-Busch, 632 F.2d 1221

---

[1] 42 U.S.C. §2000e et seq.

(5th Cir. 1980), one of the cases cited by the District Court below, should not have been followed because it was subsequently vacated and remanded. The District Court in this case, however, was aware of this subsequent case history, and observed that Decker had been vacated on grounds other than those for which it was cited.

The sole asserted ground for invoking this Court's jurisdiction is the contention that certain Circuit Court decisions are in conflict with the Fourth Circuit's opinion below. In this case, it has been held that notice to a claimant's attorney at law, duly designated and authorized by him as his representative with respect to all aspects of his employment discrimination charge, constitutes notice to the claimant sufficient to begin the Title VII ninety-day limitations period.[1] Upon examination,

---

[1] 42 U.S.C. §2000e(f)(1).

however, the decisions cited by the Petition demonstrate no such conflict.

The Petition's reliance on Thomas v. KATV Channel 7, 692 F.2d 548 (8th Cir. 1982), cert. den., 103 S.Ct. 1431, 75 L.Ed.2d 790 (1983), is misplaced for several reasons.

The opinion in Thomas clearly demonstrates that there are critical distinctions between the facts of that case and the case at hand. In Thomas, the claimant's "right-to-sue" notice was received by an employee of the claimant's attorney, but the attorney denied having confirmed with the Equal Employment Opportunity Commission his representation of the claimant. On those facts, the Thomas court refused to equate receipt by an employee of the claimant's attorney with receipt by the claimant. The Thomas court, however, went on to imply that its holding would differ under other

circumstances -- circumstances which are present in the case at hand:

> "The court in Craig, however, indicated that notice to a designated representative of an aggrieved party could satisfy statutory requirements if the notice was 'addressed in accordance with the specific directions of the employee, and receipt [was] acknowledged personally by the designated representative.' (emphasis added)."
>
> Thomas v. KATV Channel 7, 692 F.2d at 550.

As shown below, the "right-to-sue" notice in the case at bar was indeed addressed in accordance with the specific directions of the claimant and receipt was acknowledged personally by the designated representative.

The attorney who represented Bryson in connection with the Equal Employment

Opportunity Commission proceedings has acknowledged that he notified the Commission of his representation of Bryson. Further, that attorney requested the Commission to direct all correspondence to him as Bryson's attorney.

In fact, as the District Court noted, until more than two months after Bryson had personally received a copy of his "right-to-sue" notice, he continued to advise that he desired this attorney's representation.

By authorizing his attorney to represent him before the Commission and to receive all correspondence from the Commission on his behalf, Bryson gave specific directions to the Commission which were followed when that agency addressed a copy of the notice to Bryson's attorney. Further, it is undisputed that receipt of the notice was personally acknowledged by Bryson's duly authorized and designated attorney.

The distinction between the personal receipt of the claimant's notice by his duly authorized and designated representative -- in contrast to receipt by some other person -- is of critical significance because the professional, fiduciary responsibilities of an attorney to his client are safeguards protecting a Title VII claimant from any inequities that might conceivably arise from other applications of a constructive receipt theory.

Thus, exactly contrary to the Petition's assertions, it hardly appears that the Eighth Circuit has decided the precise issue presented by the instant case or that it would decide this case differently than the Fourth Circuit.

The Thomas opinion also contradicts the Petition's assertion that Thomas is in conflict with decisions such as the one below and with Gonzalez v. Stanford Applied

Engineering, Inc., 597 F.2d 1298 (9th Cir. 1979). Thomas cannot be in conflict with Gonzalez because the two cases decided different issues. Indeed, the Thomas opinion carefully distinguished the facts of that case from those appearing in Gonzalez and expressly reserved opinion on the Gonzalez decision of a different issue:

> "The Ninth Circuit has held that 'when the request for issuance of a right to sue letter comes from a claimant's attorney, notice to the attorney that right to sue has been granted starts the time running.' Gonzalez v. Stanford Applied Eng'g., Inc., 597 F.2d 1298, 1299 (9th Cir. 1979)(per curiam). In the instant case, the evidence is that appellant, not Hollingsworth, requested issuance of the right to sue letter; at most, all Hollingsworth requested was a copy of

appellant's right to sue letter. We express no opinion as to the validity of the Gonzalez holding."

Thomas v. KATV Channel 7, 692 F.2d at 550-551, n.5.

Bell v. Brown, 557 F.2d 849 (D.C.Cir. 1977), also is inapposite to the case at hand. As the District Court in this action observed:

"In Bell v. Brown, 557 F.2d 849 (D.C.Cir. 1977), an action by a federal employee under 42 U.S.C. Section 2000e-16(c), the court rejected the constructive receipt doctrine. The court founded its decision upon the belief that the procedural scheme of Title VII, and Section 2000e-16(c) in particular, is based on the assumption that Title VII complainants often will lack counsel and upon the facts that the responsible federal agency, the Civil Service Commission, issued

regulations calling for personal receipt of notice by the plaintiff as well as counsel and interpreted Section 2000e-16(c) as directing the limitation period to commence upon receipt of notice by the complainant. Here, however, there is no indication that the EEOC has similarly advised or directed that notice may not be imputed. Consequently, the reasoning in Bell does not compel a similar result under Section 2000e-5(f)(1). Cooper v. Lewis, 644 F.2d 1077, 1085-87 (5th Cir. 1981). Furthermore, this Court perceives no unfairness in the constructive receipt doctrine inasmuch as the complainant is obviously represented by counsel, the person who can and should promptly advise his client about the ramifications of a Notice of Right to Sue."

Again, Archie v. Chicago Truck Drivers, Etc., 585 F.2d 210 (7th Cir. 1978) is factually distinguishable from the instant case. In Archie, the claimant's "right-to-sue" notice was received by the plaintiff's wife. Thus, the case did not present or decide the issue of applying a constructive receipt theory as between an attorney and his client. As has been noted previously, giving effect to a constructive receipt is particularly appropriate as between an attorney and his client, due to the professional, fiduciary responsibilities which accompany such a relationship.

The Petition also cites Rea v. Middendorf, 587 F.2d 4 (6th Cir. 1978), but an examination of that opinion reveals that it does not in any fashion deal with a constructive receipt theory. In Rea, the claimant received his notice one week before his attorney received a copy. The applicable

time limitation required commencement of a civil action within thirty days of receipt of the notice, but did not specify whether the time ran from receipt by the claimant or from receipt by his representative. In these circumstances, the court held that personal notice to the claimant would start the running of the limitations period. Such holding in no way conflicts with a holding that, under certain circumstances, notice first received by a duly-designated and authorized attorney at law also begins the limitations period.

Pinkard v. Pullman-Standard, 678 F.2d 1211 (5th Cir. 1982), also is distinguishable, because it does not address the issue of when the ninety-day limitations period begins. In Pinkard, the plaintiffs filed suit before any "right-to-sue" notice had been issued by the Equal Employment Opportunity Commission. Thus, the Pinkard

court did not address a limitations issue, but decided an "exhaustion of administrative remedies" issue, an entirely distinct condition precedent to a Title VII suit.

Finally, Rice v. New England College, 676 F.2d 9 (1st Cir. 1982), lends no more support to the Petition arguments than the other cited cases. Again, the Rice opinion does not even address any constructive receipt theory. The plaintiff in Rice merely filed her complaint on the ninety-first day after receipt of her "right-to-sue" notice, and the court held that her action was time-barred.

In summary, the Petition absolutely fails to corroborate its assertion that the decisions of the courts below are in conflict with the decisions of other Circuit Courts. As shown above, the Fourth Circuit's decision in this case does not conflict with the decisions cited by the Petition, but merely

supplements existing case law on a quite narrow aspect of a limitations period applicable to Title VII actions. Because the asserted conflict between Circuit Courts does not in fact exist, Macfield Texturing, Inc. respectfully urges that the Petition be denied.

W. T. Cranfill, Jr.
3450 NCNB Plaza
Charlotte, N. C. 28280

Counsel of Record

Of Counsel:

William L. Auten
John C. Miller
Blakeney, Alexander & Machen
Charlotte, N. C.